

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1306

To be argued by
HERMAN KAUFMAN

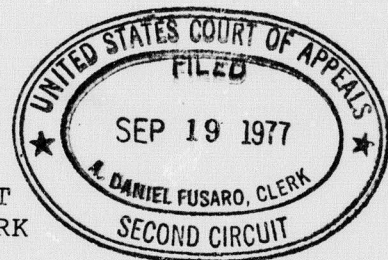
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA, :
 :
Plaintiff-Appellee, :
 :
-against- :
 :
CARL BENEDETTO, :
 :
Defendant-Appellant. :
-----X

B
P/S

BRIEF FOR APPELLANT CARL BENEDETTO

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



LITMAN, FRIEDMAN & KAUFMAN
Attorney for Defendant-Appellant
120 Broadway, Suite 1118
New York, New York 10005
(212) 349-6750

HERMAN KAUFMAN
JACK T. LITMAN
of counsel

TABLE OF CONTENTS

	<u>Page</u>
Statement.	1
Questions Presented.	2
Statement of the Case.	2
Point I - Proof of Uncharged Crimes Having No Meaningful Relationship to the Acts Alleged in the Indictment Deprived the Appellant of a Fair Trial.	9
Point II - The Unfair Cross-Examination of the Defendant Entitles Mr. Benedetto to a New Trial	16
It was improper for the Government to offer extrinsic proof, including evidence of uncharged crimes, to contradict the defendant's testimony concerning collateral matters raised for the first time by the Government	16
It was reversible error for the Government to cross-examine the defendant about his alleged use or sale of narcotic drugs	20
Conclusion	20

TABLE OF AUTHORITIES

Page

Cases

People v. Coles, 47 A.D. 2d 905 (2d Dept 1975) . . .	18
People v. McKinney, 24 N.Y. 2d 180 (1969)	15
United States v. Beno, 324 F. 2d 582 (2d Cir. 1963), <u>cert denied</u> , 379 U.S. 880 (1964)	16, 19
United States v. Brettholz, 485 F. 2d 483 (2d Cir. 1973), <u>cert denied</u> , 415 U.S. 976 (1974).	11
United States v. Chestnut, 533 F. 2d 40 (2d Cir. 1976).	10, 11, 12, 12
United States v. Coblentz, 453 F. 2d 503 (2d Cir.), <u>cert denied</u> U.S. 917 (1972).	12, 13
United States v. Deaton, 381 F. 2d 114 (2d Cir. 1967).	10
United States v. DeCicco, 435 F. 2d 478 (2d Cir. 1970).	11, 12, 13, 13
United States v. Gerry, 515 F. 2d 130 (2d Cir. 1975).	10
United States v. Harding, 525 F. 2d 84 (2d Cir. 1975).	20
United States v. Jansen, 475 F. 2d 312 (7th Cir.), <u>cert denied</u> , 414 U.S. 826 (1973).	17
United States v. Leonar, 524 F. 2d 1076 (2d Cir. 1975).	10
United States v. Lieblich, 246 F. 2d 890 (2d Cir.), <u>cert denied</u> , 355 U.S. 896 (1957)	18
United States v. Mallah, 503 F. 2d 971 (2d Cir. 1974), <u>cert denied</u> , 420 U.S. 995 (1975).	11
United States v. Papadakis, 510 F. 2d 287 (2d Cir.), <u>cert denied</u> 421 U.S. 950 (1975).	11

	<u>Page</u>
United States v. Robinson, slip op. 5021 (2d Cir. July 28, 1977)	12
United States v. Seeman, 115 F. 2d 371 (2d Cir. 1940)	10
United States v. Sir Kue Chin, 534 F. 2d 1032 (2d Cir. 1976)	12, 13
United States v. Trapnell, 495 F. 2d 22 (2d Cir.), <u>cert denied</u> , 419 U.S. 851 (1974) . .	18
United States v. Viruet, 549 F. 2d 295 (2d Cir. 1976)	11

Statutes and Other Authorities

Federal Rules of Evidence, Section 404(b)	13
Federal Rules of Evidence, Section 609.	20
Title 21, United States Code, Section 622	1, 3, 9, 14
3A Wigmore, Evidence, Section 1007 (Chadbourn Rev. 1970)	17

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA, :
 :
Plaintiff-Appellee, :
 :
- against - :
 :
CARL BENEDETTO, :
 :
Defendant-Appellant. :
-----X

BRIEF FOR APPELLANT CARL BENEDETTO

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT

Carl Benedetto appeals from a judgment of the United States District Court for the Southern District of New York, rendered by Judge Irving Ben Cooper on June 29, 1977. The decision is not reported.

Mr. Benedetto was convicted of four counts charging him with receiving money in violation of Title 21, United States Code, Section 622.

Judge Cooper imposed a sentence of eighteen months on each count, the sentences to run concurrently.

QUESTIONS PRESENTED

1. Whether evidence of uncharged crimes -- offered through two different witnesses -- in a case where there existed no uncertainty or ambiguity concerning the intent or knowledge with which the appellant may have committed the crimes charged, deprived the appellant of a fair trial?
2. Whether it was reversible error for the Government to offer extrinsic proof -- including evidence of uncharged crimes proved through a witness who testified on rebuttal -- merely for the purpose of contradicting appellant's testimony with respect to collateral matters raised initially by the Government during its cross-examination of Mr. Benedetto?
3. Whether the Government's cross-examination of appellant with respect to appellant's alleged use or sale of narcotic drugs deprived appellant of a fair trial?

STATEMENT OF THE CASE

In a four count indictment filed on April 28, 1977 in the United States District Court of the Southern District of New York (76 Cr. 1035; A. 3-6*), the defendant-appellant Carl Benedetto

*References preceded by "A" are to the pages of the appendix filed by Carl Benedetto on appeal. References preceded by "Tr." are to the pages of the transcript of the trial.

was charged with four violations of Title 21, United States Code, Section 622. The indictment charged that Mr. Benedetto was a federal meat inspector with the United States Department of Agriculture, Meat and Poultry Inspection Program and that the defendant was employed to make inspections required by the Federal Meat Inspection Act of 1967. Mr. Benedetto was charged with having received money from four different companies, wholesale meat processing plants, subject to regular inspections pursuant to the statutes just cited. The companies named in the indictment were Western Meat Company, Inc. (count one), Plaut and Stern, Inc. (count two), Park Packing Corp. (count three), and Eastern Meat, Inc. (count four). Each count in the indictment also specified the approximate dates upon which the particular company in question made the allegedly unlawful payments to Mr. Benedetto.

Trial on the indictment was held before the Honorable Irving Ben Cooper and a jury on May 5, 6, 9, and 10, 1977. Prior to the Government's calling any witnesses, it was stipulated that Mr. Benedetto was employed by the Federal Government as a meat inspector from June 1968 until January 1975 (Tr. 15).

The Government's first witness was Mr. Benedetto's area supervisor, who explained the duties of a federal meat inspector; primarily, the inspector was obliged to see to it that all foods he inspected were wholesome and fit for consumption and that the processing plants receiving the foods were sanitary. The inspector was authorized to "tie" or close down plants which did not measure up to these standards (Puchta Tr. 22-4).

The Government's principal witnesses at the trial consisted of the officers of the companies named in the indictment. They were: Joseph Staiman, President of Western Meat, Inc. (Tr. 123); Harry Langsam, President of Plaut and Stern, Inc. (Tr. 233); Jerome N. Daitch, President, and Jerome Peskin, Secretary, of Park Packing Corp. (Tr. 297, 392); and Seymour Hirsch, Secretary of Eastern Meat, Inc. (Tr. 325). Mr. Benedetto was assigned to inspect the meat at these companies at various times during the period between 1972 and 1975 (Puchta Tr. 47-51).*

The testimony of these five company officers was quite similar and followed a common and recognizable pattern. Essentially, each officer testified that shortly after Mr. Benedetto was assigned to his particular plant, an alleged bargain was struck assuring Mr. Benedetto that he would be paid somewhere between \$15 and \$25 at the end of each week (Staiman, Tr. 126-8, Langsam, Tr. 238-42, Daitch, Tr. 302; Peskin Tr. 392-5; Hirsch, Tr. 331-2, 350). The companies saw the need for such payments to the federal meat inspectors in order to guarantee that the inspectors would properly perform their jobs (see e.g., Staiman, Tr. 131; Daitch, Tr. 302-3). Thus, Mr. Langsam, the President of Plaut and Stern, Inc. realized the necessity of coming to an understanding with Mr. Benedetto, when, during his first week as an inspector at the plant, Mr. Benedetto closed down the company's operation on account of "moldy walls," a serious condition affecting the cleanliness of the plant

*Specific dates during which Mr. Benedetto was assigned to inspect the companies named in the indictment were disclosed by the appellant's area supervisor. See Tr. 47-51. These dates more or less match the dates specified in the indictment. In any event, Mr. Benedetto does not dispute the accuracy of this proof (A. 63).

(Langsam, Tr. 238-42, 259-61). Yet, it appears, at least in one instance, that the alleged bribes paid to Mr. Benedetto did not fulfill the purpose for which the payments were intended. As recalled by Mr. Staiman, the President of Western Meats, Inc., Mr. Benedetto closed down this plant on one particular occasion for two hours even though the company had already begun paying him \$25 per week (Staiman, Tr. 132-3).

Apparently, each company followed the same method of making the alleged payments to Mr. Benedetto. In each instance, the money given to Mr. Benedetto was taken out of petty cash and charged to various non-existent expenses (Staiman, Tr. 127-8; Langsam, Tr. 246; Hirsch, Tr. 333). Mr. Benedetto was paid this money every Friday -- at least according to Mr. Staiman's recollection of the matter (Staiman, Tr. 130, 171). Interestingly, however, when Staiman, the first company officer called by the Government, finished his testimony, Mr. Benedetto's area supervisor resumed the stand to complete his testimony and acknowledged that there were several Fridays when Mr. Benedetto, though supposedly receiving a bribe payment from Mr. Staiman at Western Meat, Inc., was working elsewhere, at least according to records kept in the ordinary business by the United States Department of Agriculture (Puchta 197-205). The company officers, who testified after this testimony was elicited, were careful to point out that they also paid Mr. Benedetto on Friday unless the defendant was not at the plant at that day; in such case payment was deferred until the following Monday (Langsam, Tr. 241-2; Datch, Tr. 307; Hirsch, Tr. 331).

Staiman, Langsam, Datch, Peskin and Hirsch each testified pursuant to a letter agreement worked out by each witness's attorney and the Government. Essentially, in each case, the agreement stipulated that in return for his testimony, each witness would receive immunity from prosecution, and his company would also be allowed to plead guilty to an information charging the company with a misdemeanor. It also appears that each witness well knew that he would receive complete immunity from prosecution even before he first met the assistant United States attorney handling the instant matter (Staiman Tr. 152-8, 161, 165, Ex. 15; Langsam Tr. 249-53, Ex. 17; Datch Tr. 314-8, Ex. 21; Hirsch Tr. 338-45, 355-8, Ex. 22).

The Government's remaining proof consisted of uncharged crimes similar to those acts alleged in the indictment. Arthur Breth, a partner in Arthur Breth and Son, another wholesale meat processing company where Mr. Benedetto was assigned to work in 1973 and 1974, testified that he made payments in the amount of \$10 to Mr. Benedetto every week for nearly four months (Breth Tr. 412-19).

The Government also put in similar proof on rebuttal for the purpose of contradicting testimony given by Mr. Benedetto with respect to a collateral matter (Lustgarten A. 23-53).

As part of his defense, Mr. Benedetto called several persons employed at wholesale meat companies, where the defendant had been previously assigned to make meat inspections. The witnesses never paid any money to Mr. Benedetto. Nor did Mr. Benedetto ever request or solicit such payments (Hinke Tr. 428-9; Neal Tr. 437-8; Abbazia Tr. 446-7; Sheer Tr. 509-17).

Appearing as a witness in his own behalf, Carl Benedetto, thirty six years old, married and the father of two children, testified that he was a federal meat inspector for nine years. Prior to obtaining federal employment, Mr. Benedetto was a meat cutter for six years (Benedetto A. 54-5).

Mr. Benedetto testified that he is innocent of the charges and that his accusers testified falsely against him because he required them to observe appropriate federal standards in the operation of their meat processing plants (Benedetto A. 57-8).

A number of Government witnesses tried to bribe him but he refused the offers, some of which were reported to his immediate superior, Mr. Hilburg, now deceased. Other bribes were not reported, however (Benedetto A. 68-70). On cross-examination, Mr. Benedetto was asked about a number of collateral matters. First, the Government questioned him about whether he had ever overlooked an unsanitary condition in a meat processing plant. When Mr. Benedetto responded negatively to the question, the Government attempted to impeach him by first, asking him whether he had ever overlooked a condition of condensation in the fabricating room at the Imperial Veal and Lamb Company,* where the defendant was at one time an inspector. When Mr. Benedetto denied that a problem of condensation ever existed at the plant, the prosecutor was permitted to offer in evidence a letter from Mr. Benedetto's supervisor criticizing the defendant for overlooking the condensation problem about which Mr. Benedetto had just been cross-examined (Benedetto A. 86-101, Ex. 25).

*This company was not named in the indictment.

Mr. Benedetto was also cross-examined about whether he used or sold cocaine. The Government did not attempt to contradict Mr. Benedetto's answer that he had no use, whatsoever, for any drugs (Benedetto A. 92-4).

Mr. Benedetto was also cross examined about an alleged conversation, concededly not within the scope of the indictment, between the defendant and one Herman Lustgarten, while Lustgarten was employed by S. J. Shaffer Meat Company, where the defendant was assigned to work in 1973 (Puchta Tr. 51). Specifically, Mr. Benedetto was asked if he ever told Lustgarten that he would not "stick his neck out for a mere \$10 per week payoff" (Benedetto A. 105). When Mr. Benedetto answered this question in the negative, the Government called Herman Lustgarten as a rebuttal witness; Lustgarten then testified that while employed at S. J. Shaffer Meat Company, the witness, with money provided by his employer, paid Mr. Benedetto \$10 per week, when Mr. Benedetto was assigned to work at the plant. Additionally, Lustgarten testified that Benedetto once told him that he would not "stick his neck out for only \$10 per week." Lustgarten suggested that Mr. Benedetto see the owner of the company but was never informed what happened thereafter (Lustgarten A. 23-7).

POINT I

PROOF OF UNCHARGED CRIMES HAVING NO MEANINGFUL RELATIONSHIP TO THE ACTS ALLEGED IN THE INDICTMENT DEPRIVED THE APPELLANT OF A FAIR TRIAL.

Carl Benedetto, thirty-six years old, married, and the father of two children, was convicted after a jury trial of receiving money in violation of Title 21, United States Code, Section 622. Mr. Benedetto has been ordered to serve a jail term of eighteen months upon the jury's verdict convicting him of the charges contained in the indictment. Appellant's principal contention on this appeal is that the Government, despite the apparently ample proof it offered to establish each count contained in the indictment, nevertheless went too far by proving so-called "similar acts," which served no purpose except to prejudice and frustrate Mr. Benedetto's right to a fair trial.

Following the presentation of its direct evidence in this case, the Government called two additional witnesses, Arthur Breth, a partner in Arthur Breth and Son, a meat processing plant, and Herman Lustgarten, formerly an employee of S.J. Shaffer Meat Company, also a meat processing plant. Mr. Benedetto at one time had worked as an inspector for the federal Government at both plants. Breth and Lustgarten each testified to Benedetto's receipt of alleged payoffs from both witnesses while the appellant was assigned to their plants (Breth A. 9-22; Lustgarten A. 23-53). The bribes described by both witnesses of course did not come within the purview

of the indictment. Indeed, such proof was totally pointless. The Government was blessed in this case with the clear advantage of having the jury assess the appellant's guilt of not one but four independent counts charging the same crime. Undeniably, proof of one count was reinforced by the evidence offered to satisfy the other three. Why, then, the Government felt compelled to offer additional proof falling completely outside the scope of the indictment is mystifying. Yet, it must be recognized that the Government's insistence on offering proof of "similar acts" here raises a substantial issue that is underscored by the jury's deliberations at the conclusion of the trial. The jury was unable to reach a verdict until all the testimony of Herman Lustgarten was reread, thus posing the substantial likelihood that the jury did indeed rely heavily upon the "similar act" segment of the proof offered at trial.

In the past, the court's decisions with respect to the proper use of uncharged crimes have not been completely uniform. The general rule fashioned in this Circuit is that uncharged crimes are admissible if they are "relevant for some purpose other than to merely show a defendant's criminal character, provided that [their] potential for prejudicing the defendant does not outweigh [their] probative value." United States v. Chestnut, 533 F. 2d 40, 49 (2d Cir. 1976); United States v. Leonard, 524 F. 2d 1076, 1091 (2d Cir. 1975); United States v. Gerry, 515 F. 2d 130, 141 (2d Cir. 1975); United States v. Deaton, 381 F. 2d 114, 117 (2d Cir. 1967); United States v.

Seeman, 115 F. 2d 371, 373 (2d Cir. 1940). Of course, "[e]vidence of prior crimes is customarily not admissible to show the disposition, propensity or proclivity of an accused to commit the crime charged." United States v. DeCicco, 435 F. 2d 478, 483 (2d Cir. 1970). The court has often relied on a number of different rationales in applying the general rules above to the facts of a particular case. One line of cases suggests that the introduction of uncharged crimes will be upheld unless it can be shown unmistakably that the broad measure of discretion vested in the district judge to assess the admissibility of such proof was abused. See e.g. United States v. Papadakis, 510 F. 2d 287, 294 (2d Cir.), cert denied, 421 U.S. 950 (1975); United States v. Brettholz, 485 F. 2d 483, 487 (2d Cir. 1973), cert denied, 415 U.S. 976 (1974). Other opinions have taken a somewhat more restrictive approach to the problem by suggesting that uncharged offenses should only be offered when there is a close parallelism between the crime charged and the act sought to be proved. Thus, the two offenses should be related in both subject matter and temporal proximity. See e.g. United States v. Viruet, 549 F. 2d 295, 297 (2d Cir. 1976); United States v. Mallah, 503 F. 2d 971, 981 (2d Cir. 1974), cert denied, 420 U.S. 995 (1975); see also United States v. Chestnut, supra.

Arguably, the foregoing lines of cases do not answer satisfactorily the problem of when uncharged crimes should be admissible, for they do not articulate a proper basis for the receipt of such proof and do not provide any assurance that the proof will not be

used simply to brand the accused as a criminal. In a third line of cases, however, representing the most reasonable treatment in this area, the court has indeed come to grips with the problem presented and has acknowledged unmistakably that there must be a valid and specific purpose for offering "similar acts." It has been held, for example, that where there exists a bona fide question concerning the intent with which the defendant may have acted, proof of "similar acts" may be offered to assist the jury in resolving this problem. See United States v. Chestnut, supra; United States v. DeCicco, supra. Similarly, if the defendant pleads a lack of knowledge otherwise essential to support the crime charged, it is open to the Government to prove "similar acts" to establish the missing element of knowledge. See United States v. Sir Kue Chin, 534 F. 2d 1032, 1035 (2d Cir. 1976); United States v. Coblentz, 453 F. 2d 503, 505 (2d Cir.), cert denied, U.S. 917 (1972). Also, uncharged crimes may be properly admitted in a case where evidence of the perpetrator's identity is not otherwise available. United States v. Robinson, slip op. 5021 (2d Cir., July 28, 1977).

Contrary to the thinking that went on in the court below, however, the defendant's intent, knowledge, and identity are not automatically in issue in every case, and whether they are depends on the facts offered at the particular trial. Thus, in United States v. Chestnut, supra, intent and knowledge were in dispute, because they were put in issue by the defense. There, the defendant was charged with causing a candidate whose campaign he was managing

to receive illegal contributions. Though conceding that the candidate received these illegal contributions, the defendant denied knowledge that the contributions had been made, asserting that they had been accepted and forwarded to the candidate by other members of the defendant's office staff. With the issue of the defendant's knowledge and intent thus injected into the case, it was therefore open to the Government to show that on other occasions, the defendant had personally received and forwarded to his candidate other illegal campaign contributions.

Also in point is United States v. Coblentz, supra, a fraud case, where the defendant's lack of knowledge of the fraud opened the door to the Government's offer of other similar crimes. This was also the situation in United States v. Sir Kue Chin, supra, where the defendant asserted a lack of knowledge about the contents of certain packages which contained narcotics, which the defendant had been overheard referring to as the "stuff." This revelation surely allowed the Government to offer additional proof showing that the defendant really knew what the packages contained.*

*The rationale of these cases is now embodied in Section 404(b) of the Federal Rules of Evidence, providing in pertinent part:

"b. . . Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."

The situation presented in the foregoing cases was completely different from the facts here. In the present case, no question was ever presented concerning the intent or knowledge with which Mr. Benedetto may have acted. The Government's witnesses testified that they made bribe payments to Mr. Benedetto over a particular period of time while he was assigned as a federal meat inspector to the plants in which these witnesses worked. Mr. Benedetto testified that he never received any money from these witnesses, stating that the witnesses were not telling the truth. Mr. Benedetto did not attempt to defend the charges by testifying that he did not intend to receive money or that he lacked knowledge that the money was paid to him or that his receipt of the money involved an innocent mistake. No such questions were presented to the jury. The jury was thus called upon to decide a basic question of credibility -- whether the Government's witnesses or Carl Benedetto was telling the truth. If the jury believed the Government's witnesses, Benedetto's guilt would naturally follow. The testimony of these witnesses would have established an unequivocal act from which the jury could have readily inferred any existing intent on the part of the actor. For the Government to have thus offered proof of "similar acts" to show the defendant's intent and knowledge was pure nonsense. Indeed, the crime charged here did not require any particular intent but merely proof of Mr. Benedetto's receipt of money from the people who claimed to have paid him. See Title 21, United States Code, §622.

United States v. DeCicco, supra, is dispositive of the issue presented here. In Decicco, the court ruled that it was improper for the Government to offer proof of "similar acts" because the defendant's culpability for the crime charged had never been put in issue at the trial. The defendant, implicated by a man named Parness, an accomplice in transporting stolen art goods, defended the charges by attacking Parness's credibility, but the defendant never argued that he was ignorant that the goods transported were stolen. Thus, the question of the defendant's intent or knowledge was never put into the case. The court saw no need for the introduction of prior uncharged crimes linking the defendant to the sale of stolen paintings to an insurance company, observing: "[W]hatever probative value the prior crimes of DeCicco and Gregory Parness added to the prosecution's case on the issue of defendant's intent to commit the conspiracy here claimed was far outweighed by the unwarranted inference the jury was permitted to draw that the defendants, at least defendants DeCicco and Gregory Parness were a continuing band or art treasure thieves and 'fencers.'" United States v. DeCicco, supra at 484; compare People v. McKinney, 24 N.Y. 2d 180 (1969). The DeCicco case leaves no doubt that the "similar acts" proved in the present case should have been withheld from the jury.

Accordingly, while, undeniably, the court has adopted some flexibility toward the application of the "similar acts" rule, the limits of this rule were clearly stretched in the present case. For there was no need to dredge up evidence of prior bribes paid

to Mr. Benedetto in order for the Government to make out its case. This proof did no more than show the defendant's propensity to commit the crimes charged and thus unfairly prejudiced the jury's determination of the material issues at trial.

POINT II

THE UNFAIR CROSS-EXAMINATION OF THE DEFENDANT ENTITLES MR. BENEDETTO TO A NEW TRIAL.

It was Improper for the Government to Offer Extrinsic Proof, Including Evidence of Uncharged Crimes, to Contradict the Defendant's Testimony Concerning Collateral Matters Raised for the First Time by the Government.

The Government's use of extrinsic proof to contradict Mr. Benedetto's testimony with respect to collateral matters raised for the first time during the cross-examination of the defendant constitutes another basis for reversal.

As noted in Point I, supra, the testimony of Herman Lustgarten had no independent basis of admissibility. Yet, regardless of whether Lustgarten's testimony was admissible, it was offered for an improper purpose here. Lustgarten, it will be recalled, was called to testify as a rebuttal witness to contradict Mr. Benedetto's testimony about certain collateral matters covered for the first time by the Government during its cross-examination of the defendant. It is never proper to call a witness on rebuttal for this purpose. See e.g., United States v. Beno, 324 F. 2d 582, 585 (2d Cir. 1963), cert denied, 379 U.S. 880 (1964); see also United States v. Jansen, 475

F. 2d 312 (7th Cir.), cert denied, 414 U.S. 826 (1973); 3A Wigmore, Evidence, §1007 (Chadbourn Rev. 1970). Lustgarten's "similar acts" testimony therefore resulted in double prejudice to Mr. Benedetto; in addition to being an uncharged crime, it constituted improper impeachment on a collateral matter.

Mr. Benedetto was first questioned about the matters covered in Lustgarten's testimony on cross-examination. He was asked whether, during the period he was assigned to S. J. Shaffer Meat Company, a processing plant where Lustgarten was employed, he had ever told Lustgarten that he would not settle for the meager \$10 per week payoffs he was receiving from the company's owners (A. 104). Benedetto denied ever having such a conversation with Lustgarten. Clearly, the Government's inquiry was not relevant to the matters being litigated at the trial. S. J. Shaffer Meat Company was not named in the indictment and none of its officers had anything relevant to contribute concerning the defendant's guilt or innocence of the charges. Mr. Benedetto was questioned about Lustgarten only because the Government desired to set up a "strawman" which the Government quickly destroyed when Lustgarten was called to testify in rebuttal. It was clearly improper for the Government to utilize a rebuttal witness for the purpose of merely impeaching the defendant with respect to such irrelevant matters.

Further, the analysis above is no less correct even in the event that the court concludes that Lustgarten's testimony would have been admissible as part of a Government's direct case. For the Government had no basis for deciding to wait to have Lustgarten

testify until after the defense rested. The record here gives every indication that the Government had advanced knowledge of Lustgarten's identity and whereabouts well before the trial began. Under the circumstances, there was no reason why the Government could not produce Lustgarten as a witness at the same time the Government offered its other proof.

Accordingly, what happened here went considerably beyond the permissible practice of allowing the Government some latitude in offering evidence on rebuttal which also could have been elicited earlier during the Government's direct case. See United States v. Trapnell, 495 F. 2d 22 (2d Cir.), cert denied, 419 U.S. 851 (1974); United States v. Lieblich, 246 F. 2d 890 (2d Cir.), cert denied, 355 U.S. 896 (1957); cf. People v. Coles, 47 A.D. 2d 905 (2d Dept 1975). In the two federal cases cited, this Court ruled that it was proper to permit the Government to offer evidence on rebuttal for the purpose of corroborating the main witness's testimony, which had been the subject of attempted impeachment by the defense. In the present case, however, Herman Lustgarten was not called to provide corroboration of the Government's witnesses. Instead, Lustgarten was called merely to contradict the defendant's testimony about certain collateral matters raised during cross-examination. The purpose for calling Lustgarten to testify, therefore, was clearly improper and requires a new trial.

Beyond this, the Government also tried to contradict Mr. Benedetto's testimony on cross-examination about another collateral matter, concerning the defendant's competence as a federal meat

inspector. Whether Mr. Benedetto was a good or bad meat inspector was in no way germane to his guilt or innocence of the charges, as the Government prosecutor himself acknowledged at one point during the proceedings (Tr. 430). Nonetheless, the Government, in an unnecessary sideshow lasting for several minutes during the cross-examination of the defendant, asked Mr. Benedetto if he had ever negligently overlooked an unsanitary condition, condensation in the fabricating room, at the Imperial Veal and Lamb Company. When the defendant answered that the condition described by the prosecutor as condensation was nothing more than a minor matter overlooked by the company's cleanup crew, the prosecutor probed Mr. Benedetto further and was eventually allowed to contradict the defendant's answer by offering documentary evidence, a letter from Mr. Benedetto's immediate superior [Ex. 25] criticizing the defendant for having overlooked the condition of condensation earlier alluded to by the prosecutor (A. 86-101). The incident needlessly consumed a great deal of time, it unnecessarily excited Mr. Benedetto, and it was simply not conducive to the defendant's right to a fair trial. See United States v. Beno, supra.*

*Conceivably, the Government might argue that the defendant opened the door to the proof now challenged here by testifying on direct examination that the Government's main witnesses testified falsely against him because he made their companies comply with federal meat inspection standards (A. 57). Such an argument requires no more than a "so what?" The defendant's performance while assigned to Imperial Veal and Lamb Company, a company not named in the indictment was in no way helpful to the Government to show that its witnesses were not possessed of a motive to testify falsely at trial. How ever the defendant carried out his duties at Imperial Veal and Lamb Company was of no importance in this case whatsoever.

It was Reversible Error for the Government
to Cross-Examine the Defendant About His
Alleged Use or Sale of Narcotic Drugs.

Finally, Mr. Benedetto complains that it was totally out of line for the Government to question him on cross-examination about whether he was a user or seller of cocaine, even assuming that a factual basis for these questions existed (A. 92-3). Questioning the accused about prior acts of misconduct is specifically prohibited by Section 609 of the Federal Rules of Evidence. And, although Mr. Benedetto denied using or selling cocaine, his answers did not eliminate the inherent prejudice which was obvious merely from the questions about this subject posed by the prosecutor. From the jury's standpoint, the prosecutor, a sophisticated law enforcement officer, must have had some basis for asking the questions, with the result that the jury most likely found that Mr. Benedetto was indeed a user or seller of cocaine, notwithstanding the defendant's contrary denials. Compare United States v. Harding, 525 F. 2d 84, 90 (2d Cir. 1975) (reversal required where prosecutor's questions, standing alone, during cross-examination of the defendant, incorrectly conveyed the impression to the jury that the defendant's prior testimony about a drug transaction was false).

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

Respectfully submitted

LITMAN, FRIEDMAN & KAUFMAN
Attorneys for Defendant-Appellant

HERMAN KAUFMAN
JACK T. LITMAN
of counsel

